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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(El Dorado)

CATHERINE MARIE SHOEMAN,

Plaintiff and Respondent,

v.

MICHAEL MILLS,

Defendant and Appellant.

C060351

(Super. Ct. No. PC20080582)

The relevant facts in this civil harassment case may be briefly stated. Plaintiff Catherine Marie Shoeman and defendant Michael T. Mills (a correctional officer) are neighbors who do not get along. On September 13, 2008, after they got into an argument about Mills's dogs and the fence between their backyards, Shoeman went to Mills's front door. Shoeman testified she "knocked on the door firmly, just with [her] knuckles"; Mills testified he heard "a loud pounding" or "loud banging" at the door. Shoeman testified Mills opened the door "just a couple of inches and stuck his head out"; Mills testified that as soon as he "opened the door maybe 6 to 10

inches," Shoeman "just laid into [him]." Shoeman testified she started to tell Mills, "I just want to tell you one . . . ," when "[t]he door flew open," Mills "lunged right in front of [her] face," and sprayed her with "some horrible mace that he got in [her] lungs, in [her] eyes, all over [her] arms, [her] chest." Mills testified Shoeman "came at [him] with her fist or hand drawn back, . . . so [he] brought [his] pepper spray up and delivered a burst to her face, and then . . . slammed the door."

Following an evidentiary hearing, the trial court granted Shoeman a three-year restraining order against Mills (and denied Mills's request for a restraining order against Shoeman) based on the court's finding that Mills had harassed Shoeman by spraying her with pepper spray. In finding for Shoeman, the trial court stated its belief that "the pepper spray incident [wa]s a battery upon [her]" and "an unreasonable use of force." One of the provisions in the restraining order forbids Mills from owning or possessing firearms.

On appeal, Mills contends the trial court erred in granting Shoeman a restraining order against him because "[t]he admitted evidence does not support the Court's findings." In support of his argument, however, he cites only his own testimony about the incident, ignoring the contrary testimony from Shoeman and her daughter.¹ This is insufficient to demonstrate error.

¹ Mills testified that after he sprayed Shoeman and slammed the door, "she began pounding and kicking on the door again." Shoeman's daughter, Shannon, testified there was "no way [Shoeman] could have been pounding and kicking on the door"

"It is well established that a reviewing court starts with the presumption that the record contains evidence to sustain every finding of fact.' [Citations.] [Mills's] contention herein 'requires [him] to demonstrate that there is no substantial evidence to support the challenged findings.' (Italics added.) [Citations.] A recitation of only [Mills's] evidence is not the 'demonstration' contemplated under the above rule. [Citation.] Accordingly, if, as [Mills] here contend[s], 'some particular issue of fact is not sustained, [he is] required to set forth in [his] brief all the material evidence on the point and *not merely [his] own evidence*. Unless this is done the error is deemed to be waived.'" (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.)

Even if Mills's claim of error was not waived (or, more properly, forfeited) by his failure to set forth all the material evidence, he would lose this point because Shoeman's testimony that Mills sprayed her with pepper spray without any sufficient provocation or justification was sufficient to support the trial court's finding of harassment. (See Code Civ. Proc., § 527.6, subd. (b) [harassment includes "unlawful violence," which includes "any assault or battery"].)

Mills contends the trial court erred in finding he battered Shoeman because his use of force against her was lawful under

after being sprayed, because Shannon came out of the Shoemans' house as soon as she heard her mother screaming, and her mother "was already at the edge of the lawn" "[a]bout 20 to 30 feet" from Mills's door.

Penal Code section 198.5. That statute provides as follows:
"Any person using force intended or likely to cause death or great bodily injury within his or her residence shall be presumed to have held a reasonable fear of imminent peril of death or great bodily injury to self, family, or a member of the household when that force is used against another person, not a member of the family or household, who unlawfully and forcibly enters or has unlawfully and forcibly entered the residence and the person using the force knew or had reason to believe that an unlawful and forcible entry occurred. [¶] As used in this section, great bodily injury means a significant or substantial physical injury." (Pen. Code, § 198.5.)

If for no other reason, this argument fails because Mills does not point to any evidence that Shoeman "unlawfully and forcibly enter[ed]" his residence. Mills testified Shoeman "came at [him]," but he also testified the door was open only "6 to 10 inches," and he never testified she entered the house. From Shoeman's testimony, it appears she was outside Mills's house, still on the doorstep, when he lunged out of the doorway and sprayed her. In the absence of any substantial evidence of an unlawful and forcible entry by Shoeman, Penal Code section 198.5 does not apply.

Finally, Mills contends the trial court erred by failing to inform him that, as a correctional officer, he is entitled to a one-time exemption from the firearm prohibition under subdivision (c)(2) of Penal Code section 12021. That statute provides in pertinent part that "[a]ny person employed as a

peace officer described in Section 830.1, 830.2, 830.31, 830.32, 830.33, or 830.5 whose employment or livelihood is dependent on the ability to legally possess a firearm, who is subject to the prohibition imposed by this subdivision because of a conviction under Section 273.5, 273.6, or 646.9, may petition the court only once for relief from this prohibition."

Mills's claim of error relating to this statute fails for at least two reasons. First, his claim of error is not that the trial court denied him an exemption, but that the trial court erred in failing to inform him of the statute; however, he points to no authority that required the court to do so. Absent such authority, Mills has shown no error.

Second, the statute does not apply here anyway. By its terms, it applies to a peace officer "who is subject to the prohibition imposed by this subdivision because of a conviction under Section 273.5, 273.6, or 646.9." Mills is not subject to the prohibition against firearm possession imposed by subdivision (c) of Penal Code section 12021 because he was not convicted under any criminal statute in this civil harassment case, let alone convicted under one of the three criminal statutes that would allow him to seek relief under subdivision (c)(2). To the extent Mills is subject to a prohibition against firearm possession imposed by Penal Code section 12021, it is the prohibition imposed by subdivision (g) of that statute on persons who are subject to civil harassment restraining orders issued under Code of Civil Procedure section 527.6. (See Pen. Code, § 12021, subd. (g); Code Civ. Proc., § 527.6, subd. (k).)

There does not appear to be any provision comparable to subdivision (c) (2) of Penal Code section 12021 that would allow a peace officer to seek relief from the firearm prohibition imposed by subdivision (g) of that statute (as well as by subdivision (k) of Code of Civil Procedure section 527.6). Certainly Mills has not identified any such provision, and in any event, as we have explained, the provision Mills relies on does not apply to him.

DISPOSITION

The judgment is affirmed. Shoeman is entitled to her costs on appeal. (Cal. Rules of Court, rule 8.278(a)(2).)

ROBIE, J.

We concur:

BLEASE, Acting P. J.

SIMS, J.